INTERIOR BOARD OF INDIAN APPEALS

Kaibab Band of Paiute Indians v. Acting Phoenix Area Director, Bureau of Indian Affairs

15 IBIA 277 (09/25/1987)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

KAIBAB BAND OF PAIUTE INDIANS
v.
ACTING AREA DIRECTOR, PHOENIX AREA OFFICE,
BUREAU OF INDIAN AFFAIRS

IBIA 87-30-A Decided September 25, 1987

Appeal from a decision of the Acting Area Director, Phoenix Area Office, Bureau of Indian Affairs, declining to use funds appropriated for Bureau of Indian Affairs programs to establish Individual Indian Money accounts for two minor tribal members for whom accounts had, by error, not been established during a judgment fund distribution.

Affirmed in part and remanded in part.

1. Indians: Financial Matters: Generally--Indians: Financial Matters: Individual Indian Money Accounts--Indians: Judgment Funds

   Where the Bureau of Indian Affairs has erroneously deposited into a tribal trust account certain judgment fund per capita payments which should have been placed in Individual Indian Money accounts for two minor members of the tribe, and the funds are still in the tribal account, the tribe should repay the amounts it received in error, so that accounts may be established for the minors.

2. Indians: Financial Matters: Generally--Indians: Judgment Funds

   The Bureau of Indian Affairs must be able to show by convincing evidence that it deposited judgment fund per capita payments belonging to minor members of a tribe into a tribal trust account before the tribe is obligated to repay the funds.

APPEARANCES: Dolores Savala, Chairperson, Gloria L. Bulletts, Vice Chairperson, and Troy V. Jake, Tribal Manager, for appellant; Wayne C. Nordwall, Esq., Office of the Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for appellee.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE VOGT

Appellant Kaibab Band of Paiute Indians challenges a July 14, 1986, decision of the Acting Area Director, Phoenix Area Office, Bureau of Indian Affairs (appellee; BIA), declining to establish Individual Indian Money (IIM) accounts, with funds appropriated for BIA programs, for two minor members of appellant, who were entitled to receive per capita payments from a judgment fund distribution, but for whom IIM accounts, into which the payments should have been deposited, were never established. Appellee's decision also states that because the minors' payments were erroneously deposited into appellant's trust account, appellant should transfer the funds necessary to establish the IIM accounts.

For the reasons discussed below, the Board affirms the decision in part but remands the case to appellee for further proceedings.

Background

Appellant is a band of Southern Paiute Indians which participated in the claims of the Southern Paiute Nation in Docket Nos. 88, 330, and 330-A before the Indian Claims Commission. On January 18, 1965, the Commission awarded a judgment of $7,253,165.19 in these dockets. An appropriation to pay the judgment was made in the Act of April 30, 1965, 79 Stat. 81, 108. The Act of October 17, 1968, 82 Stat. 1147 (Southern Paiute Distribution Act), provided for the disposition of these judgment funds. Pursuant to the act, BIA prepared rolls of persons entitled to participate in the distribution and apportioned the funds among the bands and groups of Southern Paiute Indians included in the judgment. Appellant's share as of June, 1971, including interest, was $1,038,126.11. Appellant prepared a plan for distribution of its share, which was approved by the Commissioner of Indian Affairs on May 13, 1971. The plan called for distribution of 15 percent of the funds to individuals under a "family plan" program and 15 percent under a "per capita" program. 139 individuals were determined eligible to share in the distribution. Each was entitled to receive $1120.28 under the family plan program and $1120.28 under the per capita program.

BIA established a control account for the funds to be distributed under the per capita program and made payments from this account to adult distributees. 1/ Funds for minor distributees were maintained in the control account until 1975 or 1976 when IIM accounts were supposed to have been established for them.

Rosetta Teller Benn and Vernon Edgar Jake were determined by BIA to be eligible to share in the Kaibab Paiute distribution. However, both died prior to approval of the distribution plan, each leaving a minor child. In probate proceedings held on December 7, 1971, the two minors, Orlando Dean Benn and Verdell Edgar Jake, were determined to be entitled to receive the

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1/ Apparently, both a control account and separate accounts for individuals were established for funds to be distributed under the family plan program.

shares of their deceased parents. On May 2, 1972, appellant's chairman requested BIA to open IIM accounts for the two minors in the amounts of $1,120.28 each for the per capita program, and $1,120.28 each for the family plan program.

Individual family plan accounts were established for the estates of Rosetta Teller Benn and Vernon Edgar Jake on February 1, 1972. The funds in these accounts were transferred to family plan accounts for Orlando Dean Benn and Verdell Edgar Jake on July 24, 1975.

However, for unknown reasons, no individual accounts for the amounts due to the two minors under the per capita plan were ever established. Instead, their per capita plan shares remained in the control account and were apparently transferred by error into a tribal account after appellant's revised judgment fund distribution plan was approved in 1977. There are still funds in this tribal account, evidently sufficient to cover the amounts due to the two minors, although the exact amount in the account is not indicated in the record.

On February 14, 1985, appellant's present chairperson wrote to the Superintendent, Hopi Agency, BIA (Superintendent), requesting that a representative of the Agency attend a tribal council meeting to explain the status of the per capita payments for the two minors. The minutes of the February 28, 1985, tribal council meeting show that an Agency representative attended the meeting, explained the events discussed above, and apparently indicated that appellant might be able to "hold BIA responsible" for the error by filing a tort claim or suing the Government. The tribal council voted to "hold BIA responsible." On March 14, 1985, the tribal council enacted a resolution, No. K-10, requesting BIA to provide the necessary funds to establish IIM accounts for the two minors.

On April 7, 1986, appellant's chairperson wrote to appellee, stating that the Superintendent had not responded to the tribal resolution. Appellee sought a report from the Superintendent, who provided a chronology of events with a cover memorandum, dated June 3, 1986, which states in relevant part:

> [W]hile we believe that the per capita accounts and funds were never set aside for Rosetta Teller Benn and Vernon Edgar Jake, we cannot fully verify that no Judgment Fund (per capita) expenditures were made in their behalf due to the inability to locate all backup accounting source documents. Furthermore, we believe that to reconstruct and/or audit Kaibab IIM account for the past fifteen (15) years would require weeks of audit work by certified auditors.
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> In conclusion we believe that when Kaibab Paiute "revised" their Judgment Fund Plan, the balances that were remaining in other Judgment Fund accounts were redistributed per their Revised Plan which included Rosetta's and Vernon's per capita share. We, therefore, recommend that Kaibab withdraw from their other current

Judgment Fund accounts to establish accounts and funds for the two individuals.

On July 14, 1986, appellee issued the decision on appeal here, declining to furnish funds to establish IIM accounts for the two minors and stating that appellant should furnish the necessary funds to establish the accounts.

Appellant appealed to the Washington office of BIA. By memorandum of March 12, 1987, the Acting Deputy to the Assistant Secretary--Indian Affairs (Tribal Services) transferred the appeal to the Board. Both appellant and appellee filed briefs on appeal.

Discussion and Conclusions

Appellant argues that, because BIA erred in failing to establish IIM accounts for the two minors, BIA should be required to furnish the funds necessary to correct its error. It states that, as a small tribe, it operates on a small budget, and its funds are carefully programmed and accounted for. To be required to furnish the funds to establish the IIM accounts would work a considerable and unjust hardship on it, appellant contends. Appellant further argues that, in its handling of appellant's judgment funds, BIA failed to observe the principles enunciated in Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942), in which the Supreme Court stated that the United States had charged itself with "moral obligations of the highest responsibility and trust" for the management of Indian property.

Appellee concedes that BIA failed to establish the IIM accounts. However, appellee argues, the funds are not beyond recovery, because appellant has sufficient funds in its judgment fund account to establish the IIM accounts.

Appellee argues that 25 U.S.C. § 164 (1982), which provides for the restoration to tribal ownership of unclaimed per capita payments, 2/ is relevant because it addresses a situation analogous to that here. The legislative history of this statute, appellant contends, indicates that the funds restored to tribal ownership, while available for general tribal use,

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2/ 25 U.S.C. § 164 (1982) provides in relevant part:

"Unless otherwise specifically provided by law, the share of an individual member of an Indian tribe or group in a per capita or other distribution, individualization, segregation, or proration of Indian tribal or group funds held in trust by the United States, or in an annuity payment under a treaty, heretofore or hereafter authorized by law, and any interest earned on such share that is properly creditable to the individual shall be restored to tribal ownership if for any reason such share cannot be paid to the individual entitled thereto and remains unclaimed for a period of six years from the date of the administrative directive to make the payment, or one year from September 22, 1961, whichever occurs later."

would also remain subject to claim by the individuals originally entitled to them. 3/

The Board is not convinced that this statute and its legislative history support appellee's argument that funds restored to tribal ownership under it remain subject to claim by the original distributees or their heirs. In fact, it might as easily be construed as cutting off the rights of missing distributees or heirs upon restoration of their shares to the tribe. In any event, however, the statute is clearly directed to situations where for some reason the per capita shares cannot be paid to the distributees and where a deliberate restoration to tribal ownership is therefore made, not where, as here, the distributees are known but are not paid because of error.

[1] Appellee further argues that the United States has the right to recover funds which its agents have wrongfully, erroneously or illegally paid, including Indian trust funds which are still held in a trust account, as are the funds in this case.

It is well established, as the cases cited by appellee demonstrate, that the Federal Government has the right, by appropriate action, to recover funds wrongfully, erroneously, or illegally paid out by its agents. United States v. Wurts, 303 U.S. 414, 415 (1938); Woods v. United States, 724 F.2d 1444, 1448 (9th Cir. 1984); Collins v. Donovan, 661 F.2d 705, 708 (8th Cir. 1981); United States v. Systron-Donner Corp., 486 F.2d 249, 251 (9th Cir. 1973).

An April 29, 1986, Comptroller General's decision, 65 Comp. Gen. 533 (1986) (B-219235), also cited by appellee, holds that amounts paid to an Indian under an erroneous probate distribution may, and should, be recovered if they are still in the Indian's IIM account. The decision discusses the principle noted above, concerning the right of the Federal Government to recover erroneous payments, and the equally well-established principle that the Federal Government has the right to set off undisbursed monies owed to a debtor against debts owed to the Government. E.g., United States v. Munsey Trust Co., 332 U.S. 234, 239 (1947).

3/ The portion of the legislative history relied on by appellee derives from the Department's statement, reprinted in H.R. Rep. No. 1005, 87th Cong., 1st Sess. (1961), 1961 U.S. Code Cong. & Ad. News 2835, 2837:

"Any segregation of tribal trust funds presents the problem of what to do with the shares of persons whose whereabouts are unknown, who are deceased and leave no heirs or devisees, or whose heirs or devisees cannot be found. Generally, such shares are eventually deposited in the Treasury of the United States subject to claim if the person ever appears, or they remain in the tribal trust fund which has been segregated.

"The proposed bill would permit these unpaid shares to be restored to the tribe for general tribal use."

The Comptroller General's decision continues:

> General trust principles are in accord. If a trustee makes an overpayment to a trust beneficiary, the beneficiary would be unjustly enriched if permitted to retain the amount overpaid. III Scott, Law of Trusts § 254 (3d ed. 1967); Restatement (Second) of Trusts § 254 (1959). Thus, in most circumstances, a trustee should be able to set off against the sums due a beneficiary a debt of the beneficiary to the trustee in the trustee's representative capacity. Bogert, Law of Trusts and Trustees § 814 (Rev. 2d ed. 1981).

65 Comp. Gen. at 537.

In Moose v. United States, 674 F.2d 1277 (9th Cir. 1982), the U.S. Court of Appeals for the Ninth Circuit held that the Southern Paiute Distribution Act created a trust for the funds of Southern Paiute minors. 4/ Thus, BIA acts as trustee for the two minors in this case. Almost certainly, and for purposes of this decision the Board assumes, BIA also acts as trustee for appellant in the management of appellant's share of the judgment funds. 5/ Appellant and the two minors are therefore co-beneficiaries.

4/ Section 6 of the act, 82 Stat. 1147, 1148, provides:

"Sums payable to enrollees or their heirs or legatees who are less than twenty-one years of age or who are under a legal disability shall be paid in accordance with such procedures as the Secretary determines will best protect their interests, including the establishment of trusts."

5/ In Whiskers v. United States, 600 F.2d 1332 (10th Cir., 1979) cert. denied 444 U.S. 1078 (1980), the U.S. Court of Appeals for the Tenth Circuit held that the Southern Paiute Distribution Act judgment funds were not held in trust and that the Secretary did not act as trustee in distributing them. In Moose, supra, the Ninth Circuit Court of Appeals distinguished Whiskers as not having addressed the provisions of the act concerning minors' funds. In Rogers v. United States, 697 F.2d 886 (9th Cir. 1983), the Ninth Circuit, relying in part on its holding in Moose, held that the general Judgment Fund Distribution Act of 1973, 25 U.S.C. §§ 1401-1407 (1982), created a trust for the funds distributed thereunder. All of these decisions predated United States v. Mitchell, 463 U.S. 206 (1983), in which the Supreme Court held that the statutes providing for the management of Indian timber established a fiduciary relationship, noted that the same pattern of pervasive Federal control evident in the timber statutes applied to the management of Indian funds, 463 U.S. at 225 n.29, and quoted with apparent approval from a Court of Claims decision:

"'[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection'. Navajo Tribe of Indians v. United States, 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980))."
463 U.S. at 225.

The general trust principles discussed in the Comptroller General's decision, above, support appellee's conclusion that funds to which the minors were entitled but which were erroneously deposited into appellant's trust account should be repaid by appellant in order to establish IIM accounts for the minors. "[W]here a trustee has paid to one beneficiary what should have been held for or paid to other beneficiaries, the other beneficiaries are entitled to have the amount of the overpayment made good by the beneficiary thus overpaid * * *" III Scott, Law of Trusts § 254 (3d ed. 1967). See also Bogert, Law of Trusts and Trustees § 814 (Rev. 2d ed. 1981) ("A trustee who has a duty to pay or distribute property to a beneficiary should be able to set off against the sum due * * * (3) a debt due from the beneficiary to another beneficiary because of a breach of duty toward the latter"); Restatement (Second) of Trusts, comment e. on § 254 (1959) (the fact that the trustee was himself at fault in making an overpayment does not preclude him from maintaining a suit against an overpaid beneficiary or enforcing a charge upon the beneficiary's interest for the amount of the overpayment). 6/

Thus, as trustee for the two minors, BIA has the right to recover funds erroneously paid to appellant; and, as an overpaid co-beneficiary, appellant has the obligation to repay amounts it was overpaid.

It is true, of course, that a trustee, as well as an overpaid beneficiary, is liable to the other beneficiaries for the amounts overpaid by the trustee. III Scott, Law of Trusts §§ 226, 254.2. Thus, if not time-barred, the minors could file a claim against the United States (although, for the reasons discussed above, the United States might then be entitled to seek indemnity from appellant).

Rather than instituting a claim against the United States on behalf of the minors, however, appellant has sought to have BIA use funds appropriated for BIA programs to rectify its error. The Comptroller General addressed a situation similar to the present one in a decision dated June 22, 1981, No. B-198352. BIA had asked whether funds appropriated for aid to tribal governments could be used to pay a Northern Paiute descendant who was inadvertently omitted from the Northern Paiute judgment fund payment roll. The Comptroller General held that BIA program funds could not be used for this purpose. His decision concludes at page 3:

> The Indian Claims Commission awarded a specific sum of money to the Northern Paiute Nation as compensation for its land, and Congress appropriated precisely that sum. These funds have been distributed in their entirety. Accordingly, we conclude that Congress having specifically appropriated set amounts to settle these claims, no other funds appropriated to the Department of the Interior, including those for aid to tribal

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6/ An overpaid beneficiary may be relieved of liability if he has so changed his position that it would be inequitable to compel him to make repayment. Restatement (Second) of Trusts § 254, III Scott, Law of Trusts § 254. In this case, the overpayment apparently remains in appellant's trust account.

governments, may be used to pay a descendant who was inadvertently excluded from participation in the distribution of judgment funds. [7/]

For the reasons discussed, the Board affirms appellee's conclusion that funds erroneously deposited into appellant's trust account, and interest accrued thereon, 8/ rather than BIA program funds, should be used to establish IIM accounts for the two minors.

[2] Although it affirms appellee's conclusion in this regard, the Board notes that there is no documentary evidence in the record that BIA actually deposited the minors' funds into appellant's account. The Superintendent's June 3, 1986, memorandum indicates that he was unable to locate all the records concerning appellant's judgment fund distribution, that he thought it would take weeks of audit work to reconstruct the account, and that he "believed" the minors' funds had been redistributed into appellant's account following approval of appellant's revised distribution plan in 1977.

Although appellee concluded that this was in fact what happened, nothing in the record documents this conclusion. In light of the uncertainty expressed by the Superintendent in his June 3 memorandum, further investigation was called for and may well have been undertaken by the Area Office. No such investigation is reflected in the record however. As trustee for appellant's funds, BIA is held to "exacting fiduciary standards," Seminole Nation v. United States, supra, 316 U.S. at 297, and therefore must produce convincing evidence that appellant was the recipient of an erroneous deposit before appellant can be considered obligated to repay the funds. See Restatement (Second) of Trusts § 172.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 14, 1986, decision of the Acting Phoenix Area Director is affirmed insofar as it concluded that funds erroneously deposited into appellant's trust account, and interest accrued thereon, should be used to establish IIM accounts for two minors who did not receive their per capita shares of appellant's judgment fund distribution. The case is remanded to the Phoenix Area Director for further investigation and documentation concerning the erroneous deposit into appellant's account. Upon compilation of documentation demonstrating that

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7/ However, in the Comptroller General's decision discussed above, concerning correction of an erroneous probate distribution, it was held that funds in the appropriation for "Operation of Indian Programs" could be used to repay an individual an amount which BIA had erroneously recovered from her. 65 Comp. Gen. at 540-541.

8/ The minors are entitled to receive interest that would have accrued on their shares had they been placed in IIM accounts. Interest has accrued on these funds on deposit in the tribal account. Appellant should therefore be considered obligated to transfer to the minors the interest accrued on funds erroneously deposited into its account.

the erroneous deposit was made, the Area Director shall issue a new decision incorporating the documentation.

//original signed
Anita Vogt
Acting Chief Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Administrative Judge